In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1944

No. 966

R. BERNARD DICKEY,
Petitioner,

vs.

RAISIN PRORATION ZONE No. 1, a proration zone organized under the laws of the State of California, et al.,
Respondents.

PETITION FOR A REHEARING OF
PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California
and
BRIEF IN SUPPORT THEREOF.

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner respectfully petitions this Court to rehear the petition for a writ of certiorari to the Supreme Court of the State of California in the above entitled cause. The petition for the writ was denied by this Court on April 10, 1945. (13 United States Law Week 396.)

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1. REASONS FOR REHEARING.

The petitioner urges a rehearing because of the great importance of the issues involved and further because several aspects of the constitutional question raised by the petitioner, the respondent in the Court below, may not have been presented with sufficient clearness and emphasis in the original petition.

The petitioner does not question the constitutionality of the Prorate Act of California as a whole. (Agricultural Prorate Act of 1933; Stats. 1933, p. 1969 as amended.) He does not question the constitutional power of the State to establish a marketing program and to make it compulsory upon all raisin growers, including those on whose behalf petitioner brings this representative suit. He does not deny that the State in pursuance of such a marketing program may withdraw a certain percentage of the raisin crop from the market for a time, and dispose of that percentage in such a way and at such a time as will be most bene-

ficial to the public and to the raisin growers themselves.

In view of applicable decisions of this Court, no question can be raised in these matters so long as the property taken from any particular raisin grower is held by the Zone or by any instrumentality selected by the Zone, for the owner and on his behalf; and so long as the ownership and enjoyment of the commodity and the fruits of his labor are not arbitrarily taken from him.

Nor would the petitioner here complain even if his title and ownership were divested in the public interest, provided it was in accordance with the constitutional provision, contained in the Fifth Amendment to the Constitution of the United States, that private property may not be taken for public use except on just compensation. The exercise of the right of eminent domain is an integral part of governmental power, and the methods by which it is to be done and by which compensation must be fixed, are set forth in many statutes and many decisions of this Court.

But the petitioner feels that he has made insufficiently clear to this Honorable Court that the taking of this property in this instance through this pledge-agreement, authorized by the Prorate Act as that Act has been interpreted by the Supreme Court of California in the case here sought to be reviewed, was not for a public but for a private purpose, so that with or without compensation it would have been in violation of the Constitution; and, further, that if it was for a

public purpose no compensation whatever has been given or offered or declared to be due to the petitioner by the State of California and no opportunity whatever has been granted to the petitioner to be heard on the amount of compensation.

The result of the pledge-agreement, which petitioner never signed and never authorized, was that a substantial portion of his crop was pledged by the Prorate Zone to secure, not his own obligation to the Zone, but the obligation of other persons who had borrowed money from the Commodity Credit Corporation. The interest of these borrowers in the surplus stock held by the Zone was deemed by the Corporation insufficient security for the loan. The Zone therefore took the property of the petitioner, so far as it was represented by his interest in the surplus, and pledged it as additional security for a loan made not to him but to other persons. If this had been done without warrant of any statute, it would have been clearly a violation of the Zone's duty as trustee of the petitioner's share in the surplus. If, as held by the Supreme Court of California, it was authorized by Section 19.1 of the Prorate Act, that section, it is submitted, so far as it authorizes this seizure, is plainly unconstitutional.

It is clear that the persons who benefit by taking the petitioner's property are the growers who borrowed money from the Corporation, not the public. The petitioner borrowed no money. He was not consulted about the loans for which his property was taken as security. He at no time assumed any obliga-

tion for these loans, either as principal or as surety. He could not be sued upon them. If there were a deficiency on foreclosure of the lien, he would not be liable for it. And yet without his consent to the loans or his participation in the contracts which created them, he is saddled with an obligation for them in the most drastic fashion known to the law, and is deprived of a valuable interest, so that other and less efficient growers, unable to borrow money on their own credit, may enjoy the fruits of his more efficient labors.

That is certainly not in accordance with the concept of property as it is maintained in our economic system. Our law does not impose as a legal obligation on individuals, the duty of assisting all necessitous persons who have happened to go into the same sort of business. If the petitioner had gone into partnership with those who borrowed money from the Commodity Corporation and had had some voice in the way they managed their affairs, a mutual responsibility could be assumed. But that is decidedly not the case. He is in no way responsible for the fact that these raisin growers are unable to borrow money either on their personal credit or on the security of their share in the raisin pool.

It may well be in the public interest that persons unable to borrow money, should be provided with facilities for borrowing in order to maintain themselves in business and prevent general financial distress. But such facilities, it is submitted, should be provided from public funds as is done by the Recon-

struction Finance Corporation (15 U. S. Code Annotated, Chapter 14, §§ 601-617) and has been done by other public agencies. Indeed, the Reconstruction Finance Corporation is authorized to make loans to farmers and these loans are properly secured only on the crops of those to whom loans are made. (15 U. S. Code Annotated, 602.) Certainly there is neither reason nor justice in placing the entire weight of this public duty on a relatively small number of persons who already bear their full share of the tax burden necessary to support these agencies.

In fact, it is not the public whose interest is being served by what amounts to a confiscation of the petitioner's share in the raisin surplus, but solely the interest of the individual borrowers. To say, as the Government does in this case, that to increase the borrowing capacity of those who cannot raise money on their private credit, is a sufficient public interest to come within the police power, can hardly be taken as a serious argument. By parity of reasoning all funds deposited in any bank could be taken as security, whenever any depositor borrows from the bank. And to lend money is the function of banks. The constitutional way to provide for the public purpose insisted upon by the Government in this case, is by means of general taxes uniformly and justly apportioned among all taxpayers, not by the arbitrary seizure of the property of selected private individuals.

2. THE SPECIAL CHARACTER OF THE PROPERTY HERE TAKEN.

The property taken from the petitioner for the benefit of other growers is of a special sort. If we assume that title to the surplus raisins vested in the Zone, this legal title is obviously held—it is expressly so stated—for the growers who have been required to contribute their surplus. Indeed, if that were not the case, since this is not a condemnation under eminent domain, even the vesting of the legal title in the Zone is subject to the beneficial interest of the growers in the surplus thus taken. Upon the beneficial interests of the growers in the surplus thus taken, the statute, as interpreted by the Supreme Court of California, imposes a lien. To impose a lien is the diminution of the property rights of the owner. It can be done by the direct act of the owner and in certain special cases it can be done by statute. It is submitted that under applicable decisions of this Court and other American Courts, the situations in which a lien may be impressed by statute are strictly limited and exclude the situation created by this pledge agreement.

That the protection of property is one of the fundamental purposes of government has been frequently stated by this Court. As long ago as 1835 we find the solemn declaration:

> "It is now considered an universal and fundamental proposition in every well regulated and properly administered government, whether embodied in a constitutional form or not, that private property cannot be taken for strictly private

> purposes at all, nor for public uses without just compensation."
>
> Nelson J. in *People v. Morris,* 13 Wend. 325, 328.

This fundamental proposition has never been denied in any decision of this Court and has never been seriously qualified, even in those cases where greatest stress has been laid on public needs. Nor is there any need of attributing sanctity to the institution of property. It is just as fundamental, if it is taken to be merely, as it is, an integral part of the economy of our country, and of all countries that have not become wholly socialistic. As Mr. Justice Holmes stated while on the Supreme Court of Massachusetts:

> "Property is protected because such protection answers a demand of human nature and therefore takes the place of a fight."

It is undoubtedly true that property rights have often been regulated and restricted in the public interest. But out of the very qualifications and limitations which our law has imposed on the unrestrained use of property rights, it becomes apparent how far beyond these restrictions is the situation presented by this case. In the following discussion the petitioner desires to lay stress only on those cases, in which, as under this pledge-agreement, a lien has been imposed by statute on particular kinds of private property which constituted important elements in the economy of particular communities.

Several of the states have statutes regulating logging operations. "Boom-companies" are chartered and licensed to regulate and facilitate the transportation of logs from the places where the timber is cut to the sawmills. In many of the states the surveyor general was charged with the duty of surveying and scaling logs, and to secure his fees, he was given a lien on all the logs that pass through the boom, not merely on the logs to the extent that he had actually surveyed them.

In the case of *Lindsay & Phelps Co. v. Miller,* 176 U. S. 126, 20 S. Ct. 326, 44 L. Ed. 400, it was held that a statute of this sort in Minnesota was valid because the owners of the logs *voluntarily* used the boom, in order to send their logs down the river. It was quite possible to send the logs down without using the boom.

This voluntary act of the defendant was declared to be essential:

> "An important question is thus presented whether the logs of one party can be subjected to a lien for surveying and scaling not only his own logs, but also for surveying and scaling logs belonging to other parties. *This statement naturally suggests a negative answer and ordinarily it may be affirmed that no man's property can be subject to a lien for services rendered upon some other man's property.*" (pp. 143-144.)

The Court goes on to say that the validity of the lien in this case rests partly on the difficulty of separating the logs that came through the boom and charging each log with its share of the fees—a difficulty that does not exist in the situation of the raisin crop; and

chiefly because the owners of the logs had voluntarily used the boom.

> "It must be borne in mind," said the Court, "that while the lien is given for the services rendered, the use of the facilities of the boom is not compulsory. * * * In that way it may be said that any log owner may send his logs down the river without the use of the boom and when he decides to avail himself of the boom it cannot be said that he is deprived of his property without due process of law if he is compelled to subject it to the conditions that the legislature prescribes for the use of the boom." (p. 146.)

In the case cited, there was no question of the importance of logging operations in the State of Minnesota nor of the public purpose served by encouraging the service of boom companies. But even as against this public service, it was emphasized that except by the voluntary act of the owner no lien could be imposed. The Court of Minnesota speaking in another case of liens of subcontractors, says the following:

> *Meyer v. Berlandi,* 39 Minn. 438, 40 N. W. 513, 1 L. R. A. 777, 12 U. S. R. 163.
>
> "As liens are an incumbrance of the owner's property, it is fundamental that they can only be created by his consent or authority. No man can be deprived of his property without his consent, or by due process of law. The basis of the right to enforce a claim as a lien against property is the consent of the owner and it is upon this principle alone that laws giving liens to subcontractors have been sustained."

As another illustration of this doctrine in this Court, we may cite the case of

Eiger v. Garrity, 246 U. S. 97, 38 S. Ct. 298.

An Illinois statute created a lien on premises in which liquor was served in favor of a married woman if liquor was sold to her husband in those premises. This Court sustained the statute and did so for the following specific reason. It held that the owner could rent the premises to whom he desired "and safeguard himself by the amount of rent reserved or otherwise for the possible damages resulting from the traffic in intoxicants which the landlord has agreed may be carried on in his premises".

That is to say, even in a case involving a policy which at the time in question seemed of major social importance and was shortly after written into the Constitution itself, this Court felt itself unable to justify a statutory lien placed upon property owned by someone not liable for the obligation which the lien secured, except upon finding as a fact, and not as a presumption, that the owner had it in his power to escape liability or to meet the burden imposed on him.

No opportunity like this, the opportunity which in the logging case and in the saloon case, was made the basic reason for permitting the lien, was granted the petitioner. He could neither prevent the credit from being granted to growers unable to meet their own obligations, nor could he withdraw from the program which required him to contribute his share to the reserve pool. He must suffer a substantial loss of property, not because he has by a voluntary act assumed the

risk of such loss, as in the Supreme Court cases cited, but because other persons who have gone into the same business as he did, are regarded by the Zoning Authorities as dubiously solvent debtors.

While the doctrine that property may not be taken from private persons, without due process of law, has been frequently and emphatically asserted by this Court, this particular question, that is, the imposition of a lien which results in deprivation of property, has only rarely come before this Court. In the two cases mentioned, the *Lindsay Co.* case and the *Eiger* case, the Court sustained the lien for the express reason that it was based on voluntary acts of the property owner, acts which he was free to omit as well as to perform. The obvious inference is that if no such voluntary act were present, the Court would have rejected the lien, as indeed the Court declares it would.

It is submitted that this situation is directly before the Court in this case, and that a decision by this Court upon it would go far not only to clarifying the law but to the securing of legitimate property interests which this Court has at all times announced its policy of safeguarding.

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3. THE DOCTRINE APPLIED IN STATE COURTS.

In a number of other cases in which an undoubted public purpose was sought to be carried out, the Courts have refused to permit the imposition of liens where no contract or agreement or voluntary act of the property owner can be found. In the case of *Fed. Farm*

Mortgage Co. v. Berzel, 69 N. D. 760, 291 N. W. 550, a statute of North Dakota was before the Court. (Laws of North Dakota, 1919, Ch. 162, Sec. 8.) By this statute a lien was placed upon the property in which workers had been injured and this lien was made superior to earlier mortgage liens. The purpose, it was declared by the Court, was "to protect the Compensation Fund to the end that workers injured in hazardous employment might have the sure and certain relief contemplated".

Certainly there could be no more important public purpose. Nonetheless, the Court declared the law to be unconstitutional as in violation of the Federal as well as of the State Constitution, unless the mortgage holder accepted the mortgage with notice that his lien might be so subordinated; that is to say, unless, by a voluntary act, he assumed the risk of having his mortgage lien reduced in value. The provisions of the statute in this respect were, in the words of the Court, "unnecessary, drastic and arbitrary".

It is submitted that they are less drastic and arbitrary than this provision of the Act here challenged is, since, in the North Dakota case, the benefits accrue to the State, and in this case, they accrue to private persons; and, secondly, in the North Dakota case, the mortgagor has the chance of refusing a mortgage under the circumstances. No such chance is present here.

And just as in the North Dakota case, the provision is unnecessary. The compensation fund in that case was supported by a system of taxation. Similarly the

Commodity Credit Corporation which is to be secured by the petitioner's property, for loans made by the Corporation to other persons, is guaranteed against loss by the statute (U. S. Stat. July 16, 1943, 15 U. S. Code Ann. §§ 713a-4) and therefore does not need this additional security out of the property of non-borrowers.

Again in *Butler v. Sussman,* 221 Ind. 47, 46 N. E. (2d) 243, 245, a statute of Indiana (Stat. Ind. 1933, Ch. 195, Sec. 32) gave pawnbrokers a lien for advances even on articles stolen and thereafter pledged. The Courts held the law to be unconstitutional as in violation of both State and Federal Constitutions, even where the pledge had been made by a husband of articles belonging to his wife.

In two groups of statutes, i.e., mechanic's lien laws and the so-called "betterment" statutes, attempts have been made at various times to create liens or what are equivalent to liens, in the interest of persons who have added value to the property on which liens were claimed. Under these statutes there is an undoubted equity, since the property owner would otherwise be unjustly enriched.

Nevertheless even in such cases, in which a lien would be a far less drastic deprivation of property than in this case, the Courts have been careful to insist either on an estoppel or on the presence of something like an agreement or consent, and have invalidated those laws when, despite the equity, no estoppel or agreement could be found.

Thus in *Santa Cruz Co. v. Lyons,* 117 Cal. 212, 48 P. 1097, 59 U. S. R. 174, a California statute allowed a lien on land for work done upon or at the request of the "reputed" owner. This statute was held to be unconstitutional unless an estoppel were present. Said the Court:

> "He (i.e. the true owner) cannot be deprived of his title to the land, nor can a lien be imposed thereon against his will by virtue of any agreement or contract on the part of one who is merely reputed to be the owner of such land * * *
>
> "It is no more within the constitutional power of the legislature to authorize a reputed owner of a lot or parcel of land to create a lien thereon against the will of the true owner than it would be to authorize such reputed owner to transfer the title to said land."

Similarly in *Chears Co. v. Gidden,* 159 Miss. 288, 131 So. 426, it was held that the mechanic's lien statute could not constitutionally place a lien on the house of a married woman for services rendered on her husband's contract.

In order to protect those who have furnished labor and materials statutes have gone far. They have required owners of property, when the services have been rendered to occupants to give notice of non-responsibility in order to relieve their property from a lien imposed for the purpose of securing an obligation which they had not themselves incurred, but which the occupants had incurred. Even this much so far as it required an affirmative act to escape responsibility,

was held in some States to make the act unconstitutional. (Cf. *Meyer v. Berlandi*, 39 Minn. 438, and *Randolph v. Builders*, 106 Ala. 501, 17 So. 721, 724.) And where the law was sustained, it was sustained explicitly on the basis of the fact that the owner actually had an opportunity to avoid the lien. (Cf. *Smith v. McCoy* (1931), 58 S. D. 256, 235 N. W. 661.)

Similarly in the "betterment" statutes, in which liens have been imposed in favor of persons who had inadvertently built upon property belonging to others, the only basis that could be found is the equity involved in unjust enrichment. If the value of the property had been substantially enhanced, it seemed only fair to require that those who had in good faith enhanced it should be compensated. But where no enhancement existed or no good faith, no lien was permitted. Cf. such cases as

Griswold v. Bragg, 48 F. 518;
Leighton v. Young, 52 F. 439;
Searl v. School District, 133 U. S. 553, 561, 33 L. Ed. 740, 10 S. Ct. 374,

where the taking was by virtue of the right of eminent domain. Even then, when the statute became too drastic it was denied validity. So when a statute permitted the occupant claimant to remain in possession until the improvements were paid for, the law was declared to be unconstitutional.

Bank of Hamilton v. Dudley's Lessees, 2 Peters 492;
Green v. Biddle, 8 Wheat. 1;
McCoy v. Grandy, 3 Oh. St. 463;
Childs v. Shower, 18 Iowa 261.

From none of these cases can any support be found for the validation of the act of the Zoning Authority in imposing a lien on the property of the petitioner for the benefit of third persons. Nor can any established principle or doctrine of our law be cited which supports the contention that a statute can vest any governmental agency with such power. It goes beyond anything that has been proposed before and has no analogy in any recognized constitutional exercise of control over the property of American citizens.

When we further remember that the statute says nothing expressly about a loan program at all, and that the power to carry out such a program is implied by the majority of the Supreme Court, the extraordinary character of the act here challenged becomes still more apparent. It is conceded that if a loan program is necessary to effect the purpose of the statute, the Zoning Authority may be clothed with that power. But certainly it cannot by implication be clothed with a power which the statute itself could not confer upon the Authority, if it had attempted to do so by set and explicit words.

Before closing, we desire to touch upon one other point relied upon by respondents herein in opposition to the petition for certiorari:

4. TIMELINESS OF THE FEDERAL QUESTION.

The claim that the Prorate Statute, as finally interpreted by the Supreme Court of California in this case, is repugnant to the Fourteenth Amendment was explicitly raised in petitioner's petition for a rehearing in the Supreme Court of California. That Court

denied the petition, and the Chief Justice of the Court gave a certificate to the effect that in denying the petition the Court considered and rejected the claim made under this federal question.

Concededly that certificate would not have been enough under the decisions of this Court if there had been nothing in the record from which this Court could infer that a federal question had been raised. The most recent decision is *Charleston Federal Savings Association v. Alderson*, 65 Supreme Court Reporter 624 (not yet officially reported). But in that case, as in the cases cited in Note 1 on page 627 of that report, except for the certificate there would have been no evidence before this Court that a federal question had been raised. This is not the case here, since the petition for a rehearing did explicitly raise the federal question and the certificate of the Chief Justice is conclusive evidence that, as required by the case of *Fullerton v. Texas*, 196 U. S. 192, 25 S. Ct. 221, 49 Law Ed. 443, the federal question was "expressly decided" when the petition for a rehearing was denied.

In any case, the petitioner respectfully points out that the certificate of the Chief Justice was added *ex abundanti cautela*. It is his contention that under existing cases, the wholly unanticipated decision of the State Supreme Court made the petition for a rehearing his first opportunity to raise the federal question. Until the decision of the California Supreme Court, the issue in the trial Court and the District Court of Appeal concerned itself wholly with the question of whether the pledge-agreement which

is here asserted to be invalid, was within the power of the Zoning Authority.

The trial Court and the District Court of Appeal sustained the petitioner's contention that the Zone had no such power under the statute. All the arguments in these Courts were directed to this question. The appeal by respondents here was therefore concerned merely with the interpretation of the statute. Under these circumstances, it can certainly be said that the decision of the Supreme Court, which first made the federal question in issue, was entirely unexpected and the raising of the federal question before that decision would have been "speculative". This brings the matter fully within the rule announced in *Ohio v. Akron Park Dist.*, 281 U. S. 74, 79, 50 S. Ct. 228, 74 Lawyers' Ed. 710 and *Saunders v. Shaw*, 244 U. S. 317, 37 S. Ct. 638, 61 Lawyers' Ed. 1163. Otherwise, to quote the latter case:

> "It would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here." p. 320.)

It is clear that what has happened here is that, in the words of this Court in *American Surety Co. v. Baldwin*, 287 U. S. 156, at 164, the claim is based on "the unanticipated act of the State Supreme Court *in giving to the statute a new construction which threatened rights under the constitution*". (Emphasis supplied.)

Cf. *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U. S. 673, 678 and
Missouri v. Gehner, 281 U. S. 313, 320.

5. CONCLUSION.

The petitioner wishes to repeat that he does not question the importance of the scheme of prorating crops nor the power of the State to make reasonable provision to protect agricultural markets from collapse. He does not question the right of the State to require the contribution by the petitioner of 20% of his raisin crop to the surplus pool, to be dealt with as the needs of the market required. He does not question the power of the State to take over this surplus, on the principle of eminent domain for just compensation and after due process is had to determine what compensation is just. But he earnestly contends that to take over the petitioner's share of this surplus, not as an exercise of the power of eminent domain and without compensation, and to do so for the benefit of private persons, cannot be sustained. In the words of Mr. Justice Holmes in the case cited in the petition for rehearing, page 26 (*Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 415):

> "That cannot be accomplished in this way under the Constitution of the United States."

It is because the petitioner feels that these considerations have not been fully presented to this Honorable Court, that he respectfully urges a rehearing of the petition for a writ of certiorari to the Supreme Court of California, to the end that a question of such fundamental importance, under the Constitution of the United States, a question never before passed on by this Court, and involving operations of the highest moment to the economy of the country, be given the

advantage of full argument and consideration by the highest Court of the country.

Dated, San Francisco, California,
May 1, 1945.

WALTER M. GLEASON,
MORGAN J. DOYLE,
Attorneys for Petitioner.

MAX RADIN,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, Berkeley, California,
May 1, 1945.

MAX RADIN,
Of Counsel for Petitioner.